

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

KIRT NICHOLAS,

Petitioner,

-against-

SMITH, Superintendent,

Respondent.

02 CV 641 (PAC) BROOKLYN OFFICE

NOT FOR
ELECTRONIC OR PRINT
PUBLICATION

MEMORANDUM AND
ORDER

ROSS, United States District Judge:

By memorandum and order dated April 2, 2007, the court observed that it appeared petitioner's claim that his trial counsel was ineffective for allowing petitioner to waive his appellate rights may be unexhausted but procedurally barred. On this basis, the court ordered supplementary briefing. Petitioner filed a letter addressing this issue on April 12, 2007. Upon review of petitioner's letter, it became clear that a page was missing from the state court record filed with the court. The court requested respondent's attorney to submit the missing page—page 7 of the memorandum of law filed by petitioner's counsel on direct appeal. Based on review of petitioner's direct appeal in its entirety, the court is satisfied that petitioner fairly presented this claim to the state courts as required to exhaust state law remedies. See Daye v. Attorney

Gen. of New York, 696 F.2d 186, 191 (2d Cir. 1982). Accordingly, no further briefing on this issue is required and the court will proceed to decide petitioner's claim on the merits.

SO ORDERED.

✓ /S/ ✓

Allyne R. Ross
United States District Judge

Dated: April 18, 2007
Brooklyn, New York

Service List:

Petitioner's Attorney:

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cc: Magistrate Judge Lois Bloom